91-1850

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANK JAMES,

Petitioner

versus

MILWAUKEE COUNTY and FRANKLIN LOTTER,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the eighth amendment impose a duty on the State to take minimal steps to classify and separate inmates at the time they are taken into custody according to propensity for violence?

2. Did the lower court properly review Milwaukee County's inmate classification and housing policy in connection with an inmate's right to personal security?

3. Does the victim of an inmate-on-inmate attack have to provide statistical or comparative proof of a pervasive risk of harm to make out a case for deliberate indifference, or is it enough to show that a municipality acted with deliberate indifference by instituting and maintaining a policy which disregards an inmate's right to personal security?

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REFERENCE OF REPORTS AND OPINIONS

The Opinion of the court below is reported in the Official Federal Reports at 956 F.2d 696 (7th Cir. 1992), and is included herein as Appendix A. Also included as Appendices are the trial court's oral decision (Appendix B) and written decision denying plaintiff's motion to alter the judgement and for a new trial (Appendix C).

JURISDICTIONAL STATEMENT

This petition for a writ of certiorari seeks to bring a judgement of the United States Court of Appeals for the Seventh Circuit, entered on February 12, 1992, before this Court for review. Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The relevant portion of 42 U.S.C. Sec. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... .

STATEMENT OF THE CASE

On March 7, 1988, Petitioner FRANK JAMES ("JAMES") was taken into custody by Respondent MILWAUKEE COUNTY at the Milwaukee County House of Correction ("HOC") because of a minor violation of his probation arising out of a single misdemeanor theft conviction. JAMES had no further criminal history.

The HOC is a dormitory facility in which sixty or more inmates are housed in each open dorm under the supervision of one guard.

MILWAUKEE COUNTY's admitted classification policy was to house all probation violators together with all parole violators, without regard to criminal history or any other criteria arguably directed at separating violent inmates from non-violent inmates.

Pursuant to this official policy, JAMES was assigned to the same dormitory as Willie Hannah, a three time convicted sexual assailant who was in the custody of MILWAUKEE COUNTY for violating his parole from the Wisconsin prison system.

On April 10, 1988, Hannah attacked JAMES in their shared dorm and broke JAMES' neck with his bare hands.

JAMES filed suit against MILWAUKEE COUNTY, and its policy maker at the HOC, Superintendent FRANKLIN LOTTER ("LOTTER"), under 42 U.S.C. Sec. 1983. The case proceeded to trial on allegations that the classification policy at the HOC deprived JAMES of his eighth amendment right to personal security because it failed to incorporate any criteria directed at predicting an individual inmate's propensity for

violence. At the close of JAMES' case, the district court granted MILWAUKEE COUNTY's motion to dismiss on the grounds that MILWAUKEE COUNTY's inmate classification policy was not unconstitutional. (App. B).

JAMES appealed the dismissal, and on February 12, 1992, the Court of Appeals issued its Opinion and entered Judgement affirming the district court's order. James v. Milwaukee County, 956 F.2d 696 (7th Cir. 1992) (App. A).

ARGUMENT IN SUPPORT OF THE PETITION

I. **Certiorari Is Appropriate To Resolve A Split In The Circuits Concerning An Inmate's Eighth Amendment Right To Be Afforded A Housing Classification System Which Incorporates Any Minimal Criteria Designed To Separate Violent Inmates From Non-Violent Inmates.**

The decision of the Seventh Circuit, that the eighth amendment did not entitle JAMES to a particular prison classification system, JAMES, Id. at 703, stands in conflict with the precedent of at least two other circuits. Certiorari from the Court could address the existing discordant treatment of inmate classification and the State's affirmative duty to protect those within its custody. DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249, (1989).

The Fifth Circuit, in Gates v.Collier,

501 F.2d 1291, (5th Cir. 1974) affirmed a district court's order that the Mississippi State Penitentiary implement a classification system of assigning inmates to dormitories based upon the severity of their offense. The Fifth Circuit did not require the plaintiffs to present statistical or comparative evidence to establish the risk inherent in housing violent and non-violent inmates together in open dorms under the supervision of one guard. Gates, Id. at 1308,9.

More recently, the Sixth Circuit in U.S. v. State of Michigan, 940 F.2d 143 (6th Cir. 1991), affirmed that part of the district court's order that required the State of Michigan under the eighth amendment to implement a meaningful inmate security classification, because

personal safety is a basic human need of which even convicted criminals may not be deprived. Id. at 147, 157. The Sixth Circuit reversed the district court's order that required Michigan to include "programming needs" (such as vocational guidance, educational opportunities) in the classification system, because unlike an inmate's eighth amendment right to personal safety, The absence of programming needs does not "involve the unnecessary and wanton infliction of pain," and thus does not rise to the level of an eighth amendment violation. Id.

Decisions of other Circuit Courts emphasize the policy underlying these cases, to wit, that meaningful inmate classification, especially in a dormitory setting, is essential to the inmate's

right to personal safety. See Gibson v. Lynch, 652 F.2d 348, 351 (3rd Cir.1981) ("The need to classify prisoners coming into the system and segregate them until the completion of the classification process is too evident for argument"); Withers v. Levine, 615 F.2d 158, 162 (4th Cir. 1980)(the practice of housing inmates together without regard to their individual differences constitutes complete indifference to the problem of safety).

The Seventh Circuit broke from this line of cases when it upheld MILWAUKEE COUNTY's classification policy as complying with the eighth amendment. In doing so, the Seventh Circuit failed to inspect MILWAUKEE COUNTY's classification for any criteria arguably directed at protecting inmates from attack by other

inmates. To hold that MILWAUKEE COUNTY had no knowledge that its policy of mixing violent and non-violent inmates in open dormitories posed a risk of harm, not only defies logic and common sense, but it completely emasculates an inmate's eighth amendment right to personal safety.

II. Certiorari Is Necessary to Determine Whether An Inmate Must Present Statistical Or Comparative Evidence To Establish Deliberate Indifference

In City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), This Court declared that proof of a single incident of unconstitutional activity was sufficient to impose municipal liability, as long as it includes proof that it was caused by

an existing, unconstitutional municipal policy. At the very least, an affirmative link must exist between the policy and the constitutional violation alleged. Tuttle, Id. 471 U.S. at 823.

In James, Petitioner established that the official housing classification at the HOC was to place all probation and parole violators in the same dorm, without regard to criminal history or any other criteria designed to predict inmate violence.

Despite the Seventh Circuit's Opinion, JAMES never argued that his expert's system should be the constitutional baseline, nor that probation violators should never be housed with parole violators. See James, Id. at 697, 702.

The point is that MILWAUKEE COUNTY's classification system ignored inmate

safety, and thus violated the eighth amendment. Under Tuttle, an affirmative link exists between MILWAUKEE COUNTY's policy and JAMES' deprivation of personal safety. The Seventh Circuit avoided this analysis and dismissed Tuttle as applying only to situations in which the court is asked to infer the existence of a municipal policy. James, Id. at 700, fn. 4.

Instead, the court embarked on an analysis of whether JAMES made a showing of a pervasive risk of harm, from which MILWAUKEE COUNTY's knowledge and disregard thereof could be inferred. James, Id. at 700. None of the cases relied upon by the court in its analysis dealt with an admitted municipal policy which was facing a constitutional challenge as in James. By incorporating

this analysis, however, the Seventh Circuit added an unnecessary layer of statistical or comparative evidence to JAMES' burden of proof. The fact that mixing violent and non-violent inmates in an open dormitory under the supervision of one guard creates a risk of harm is so obvious that it need not be stated. Nonetheless, JAMES' expert testified about the risk created by MILWAUKEE COUNTY's policy, and taken together with the rest of JAMES' proof (eg., MILWAUKEE COUNTY disregarded the warnings of its own consultants prior to the attack on JAMES that the probation/parole classification be subdivided; See James, Id. at 698) established MILWAUKEE COUNTY's deliberate indifference (criminal recklessness) to JAMES' eighth amendment right to personal safety.

CONCLUSION

This Court should issue a writ of certiorari to the Seventh Circuit based upon all of the questions presented for review in this petition.

Respectfully submitted this 12th day of May, 1992.

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APPENDICES

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-1497

FRANK JAMES,

Plaintiff-Appellant,

v.

MILWAUKEE COUNTY and FRANKLIN LOTTER,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 C 1128—**Terence T. Evans, *Judge.***

ARGUED DECEMBER 3, 1991—DECIDED FEBRUARY 12, 1992

Before WOOD, and FLAUM, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

FLAUM, *Circuit Judge.* On April 10, 1988, a dispute erupted between Willie Hannah and Frank James, two inmates at the Milwaukee County House of Correction (HOC). Hannah, the larger of the two men, apparently attacked James over an outstanding gambling debt. In the ensuing struggle, Hannah grabbed James' head with his bare hands and broke his neck, rendering him a quadriplegic. James filed suit, not against the perpetrator of this assault, but under 42 U.S.C. § 1983 against Milwaukee County and its prison officials for allowing the assault to

occur under their watch. James alleges that the County's inmate classification system, under which parole violators and probation violators are housed in the same open dormitories without regard to criminal history, is cruel and unusual punishment under the eighth amendment.[1]

I.

James was originally convicted for a single count of theft, a non-violent misdemeanor against property, and received *probation* in lieu of prison time. He subsequently violated the terms of his probation and was sent to prison. Hannah, by contrast, was originally convicted of three counts of sexual assault, a violent felony against persons, and served part of his sentence for those crimes before a grant of *parole*. Hannah was back in prison for violating the terms of his parole at the time of his encounter with James. Both James and Hannah were classified as probation/parole violators and assigned to the "H dorm," an open, medium security dormitory of 60 inmates under the supervision of one guard.

James asserts that he and Hannah should never have been housed together. He contends that the defendants' inmate classification policy created a substantial risk of violence by permitting violent felons (like Hannah) and non-violent misdemeanants (like James) to be assigned to the same dormitory. James argues that a meaningful classification system would, at minimum, separate parole violators from probation violators, thereby reducing inmate violence. The unstated premise of this argument is that an inmate's status as a parole violator (versus a proba-

[1] James premised his original complaint on an entirely different § 1983 theory; he alleged that the defendants acted with deliberate indifference to his physical safety by ignoring gang violence, as well as Hannah's coercive attempts to recruit him into a gang. One week before trial, James abandoned this theory of liability, filing an amended complaint premising liability on the inmate classification system.

tion violator) accurately reflects propensity for violence behind bars. Presumably this is so because parolees, unlike probationers, were given prison time and hence must have committed a crime serious enough, or had a criminal history serious enough, to warrant incarceration in the first place. Conversely, under this reasoning, probationers were granted clemency after conviction and never served time, presumably because their crime was less serious or because they had a less serious criminal history. According to the plaintiff, non-violent inmates like James (a convicted thief) are more susceptible to attack by violent inmates like Hannah (a convicted rapist).

In support of his claim, James offered the testimony of expert witness John Buckley, a former prison superintendent. Buckley testified that, to reduce prison violence, an effective classification system should separate inmates as follows: parole violators from probation violators, felons from misdemeanants, inmates convicted of crimes directed at people from those convicted of crimes directed at property, and inmates with violent criminal records from those with non-violent records. Buckley further testified that these classification criteria have been universally accepted throughout the United States and Western Europe and that, of the 150 correctional facilities he has inspected, nearly all employed some classification designed to separate violent criminals from non-violent criminals. In addition to this expert testimony, James points out that a consultant hired by Milwaukee County in 1987 recommended that it discontinue the practice of housing parole and probation violators together.

In response, the defendants argue that James failed to present any concrete evidence of inmate violence at the HOC (aside from Hannah's assault of James) to support his claim that its inmate classification system spawns violence. James' expert witness testified only as to his view of the ideal inmate classification system—he was never asked to review statistical evidence of violence at the HOC, or to demonstrate a causal relationship between

Milwaukee County's classification system and inmate violence. The defendants also maintain that inmates Hannah and James had more in common than not. Parole and probation are both acts of grace or clemency granted to a seemingly deserving defendant and both Hannah and James had recently been determined appropriate candidates for release into the community. Both were adult males and convicted criminals. Neither had been seriously disciplined while in the HOC and neither had a record of inmate violence in prison.

At trial, after James rested his case, the district judge granted the defendants' motion for a directed verdict, concluding that James had failed to show an eighth amendment violation and that the defendants' classification system passed constitutional muster as a matter of law. For the reasons offered below, we affirm.

II.

We review *de novo* a district court's grant of a motion for directed verdict. *Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988). In doing so, we determine whether the evidence presented, combined with all reasonable inferences drawn from it, is insufficient to support the verdict when viewed in the light most favorable to the non-moving party. *Id.* "The district judge is not to resolve conflicts in testimony or weigh and evaluate the evidence, functions that are reserved to the factfinder." *Id.* However, if the non-movant presents insufficient evidence upon which a reasonable person could properly base a verdict in his favor, judgment as a matter of law for the movant is appropriate. *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985). Moreover, a mere scintilla of evidence will not prevent a directed verdict. *Id.*; *see also La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

III.

Relying on identical provisions in the English Bill of Rights of 1689 and the Virginia Declaration of Rights of 1776, the Framers of the eighth amendment sought, as its words suggest, to prevent judges and legislators from imposing on citizens barbarous or "cruel and unusual" forms of punishment. *See generally* Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839 (1969). Consequently, the eighth amendment has long been thought to prohibit such inhumane punishment as torture, lingering death, *In re Kemmler*, 136 U.S. 436, 447 (1890), drawing and quartering, disembowelling, and burning at the stake. *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879). But beyond this, the Supreme Court has interpreted the eighth amendment "in a flexible and dynamic manner," *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (joint opinion), to reach beyond the extreme physical punishments proscribed in early American history. Today it prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *id.*, 428 U.S. at 173, or are grossly disproportionate to the severity of the crime. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring).[2] Thus, prison conditions involving the wanton and unnecessary infliction of pain, totally without penological justification, offend the constitution. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

However, not all prison conditions trigger eighth amendment scrutiny—only deprivations of basic human needs like food, medical care, sanitation, and physical safety. *Id.*; *see also Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 832 (D.C. Cir. 1988); *cf. Bell v. Wolfish*, 441 U.S. 520 (1979). So, for example,

[2] Although not at issue in this case, the continuing vitality of the eighth amendment proportionality principle has been questioned. *See Harmelin*, 111 S. Ct. at 2691 (opinion of Scalia, J.).

a prisoner who is denied a pack of playing cards or a television set has not set out a deprivation of constitutional dimensions under the eighth amendment. Here the alleged deprivation is the right to physical safety, a right addressed by this Court on several occasions. *See, e.g., McGill v. Duckworth*, 944 F.2d 344, 347 (7th Cir. 1991) (sexual assault); *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991) (second-hand smoke), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Dec. 9, 1991) (No. 90-2588); *Wilks v. Young*, 897 F.2d 896, 897-88 (7th Cir. 1990) (inmate assaults); *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990) (same); *Goka v. Bobbitt*, 862 F.2d 646, 651 (7th Cir. 1988) (tool control policy); *Richardson v. Penfold*, 839 F.2d 392, 394-95 (7th Cir. 1988) (sexual assaults); *Walsh v. Mellas*, 837 F.2d 789, 794 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988) (inmate violence); *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (prison bus fire); *Benson v. Cady*, 761 F.2d 335, 339 (7th Cir. 1985) (defective prison exercise equipment).

It is not disputed that James' physical safety was compromised while housed at the HOC. However, to prevail under contemporary eighth amendment standards, he must prove more—namely, that the defendants acted with the requisite mental state. This area of the law, which remained in flux for some time, was recently settled by the Supreme Court in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). Because "the infliction of punishment is a deliberate act intended to chastise or deter," *Wilson*, 111 S.Ct. at 2325 (quoting *Duckworth*, 780 F.2d at 652), the Court concluded that intent is inherent in the use of the word "punishment." Negligence or even gross negligence is not enough; rather, plaintiffs must show *actual intent* or *deliberate indifference* on the part of state actors in order to make out an eighth amendment claim.[3] *See McGill*, 944 F.2d at 347.

[3] Without addressing the deliberate indifference standard, James contends that he is entitled to a "reasonably safe prison environment." However, as the district court noted, the case on which

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"Deliberate indifference" means *recklessness* in a criminal, subjective sense: disregarding a risk of danger so substantial that knowledge of the danger can be inferred. *See Duckworth*, 780 F.2d at 652. Such disregard is tantamount to intending that the injury occur. Put another way, recklessness in the context of prisoner safety requires "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *McGill*, 944 F.2d at 348 (quoting *Duckworth*, 780 F.2d at 653). A prisoner normally proves actual knowledge of impending harm by showing that he alerted prison officials to an identifiable threat to his safety. *McGill*, 944 F.2d at 349; *Santiago*, 894 F.2d at 223-24; *Goka*, 862 F.2d at 647-48; *Walsh*, 837 F.2d at 795-96, 798. Alternatively, a plaintiff can show, as noted above, the existence of so substantial a risk of harm that "the defendants' knowledge of the risk can be inferred." *Whitley v. Albers*, 475 U.S. 312, 321 (1985) (quoting *Duckworth*, 780 F.2d at 652); *see also Santiago*, 894 F.2d at 221 n.6 (defendant acts recklessly "by consciously disregard[ing] a substantial and unjustifiable risk" of danger); *Goka*, 862 F.2d at 651 ("threat of violence is so substantial or pervasive" that knowledge can be inferred); *Estate of Davis v. Johnson*, 745 F.2d 1066, 1071 (7th Cir. 1984) (to demonstrate callous indifference to inmate safety, plaintiff must show a "strong like-

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[3] *continued*

he relies for this proposition, *Ryan v. Burlington*, 889 F.2d 1286, 1293 (3d Cir. 1989), is inapposite to the facts of this case. *Ryan* dealt with a pretrial detainee's due process rights under the fourteenth amendment and held that they had a right to a "reasonably safe prison environment." *Id.* at 1293. Whatever the merits of applying a reasonableness standard in the context of claims by pretrial detainees—a standard, we note, rejected in this Circuit, *see, e.g., Brownell v. Figel*, ___ F.2d ___, ___ n.5 (7th Cir. 1991)—it is abundantly clear that courts are to apply a deliberate indifference standard under the eighth amendment. *See Wilson*, 111 S.Ct. at 2325; *McGill*, 944 F.2d 347; *see also Moore v. Winebrenner*, 927 F.2d 1312 (4th Cir. 1991) (rejecting a reasonableness standard under the eighth amendment).

lihood" of violence, not just a random act of violence); *accord Andrews v. Siegel*, 929 F.2d 1326, 1330 (8th Cir. 1991) (to establish recklessness, must show officials faced with a pervasive risk of harm); *Moore*, 927 F.2d at 1315 (plaintiff must show deliberate indifference to a pervasive risk of harm); *Williams v. Willits*, 853 F.2d 586, 588 (8th Cir. 1988) (plaintiff must demonstrate a pervasive risk of harm; a single incident does not demonstrate deliberate indifference); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985) (prison officials must demonstrate deliberate indifference to a pervasive risk of harm); *Fisher v. Koehler*, 692 F. Supp. 1519, 1560 (S.D.N.Y. 1988) (plaintiff must show inmate violence is a substantial and widespread problem); *McGriff v. Coughlin*, 640 F. Supp. 877, 880 (S.D.N.Y. 1986) (absent statistical evidence showing prison security policies resulted in increased violence, no deliberate indifference).

Although James' original complaint alleged actual knowledge, his amended complaint takes the latter approach, alleging instead inferred knowledge. He claims that Milwaukee's prisoner classification system created a pervasive risk of violence, and that the individual defendants ignored that risk.[4] James tried to demonstrate defendants' knowl-

[4] James is suing the municipality and officials responsible for his incarceration rather than any of the prison guards on hand at the scene who could conceivably have contributed to his injury. *Cf. Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991) (injuries caused by prison guards); *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988) (guards stood by and permitted attack to occur), *cert. denied*, 489 U.S. 1034 (1989). Suits of this sort were expressly approved in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), which concluded that municipalities may be held directly liable under § 1983 for official policies or customs that result in constitutional deprivations.

James challenges Milwaukee County's prison housing policy based on only one incident of an alleged constitutional deprivation. In evaluating this "single incident" claim, both parties rely on *Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24 (1985). *Tuttle*, however, addresses situations where a plaintiff that is aggrieved by

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edge of the likelihood of attack solely through expert testimony that the HOC housing policy was apt to cause increased inmate violence. But this is insufficient to demonstrate a risk substantial enough to warrant a finding of inferred knowledge. James offers no concrete proof, such as statistical or comparative evidence, to show this policy resulted in increased inmate violence. Indeed, the record is void of a single other instance in this prison, or any other prison, where an inmate attack was attributable to the policy of housing parole violators with probation violators. James failed to show a causal relationship between the challenged policy and the particular constitutional deprivation alleged, here physical safety. This is not a case where James had been subjected to repeated threats yet prison officials sat by idly with knowledge of those threats. Nor is it a case where a prison policy created such a pervasive risk of harm that defendants' knowledge of the risk can be inferred. Even if it was negligent or even grossly negligent for Milwaukee County to house parole and probation violators together, a reasonable jury could not have found it sufficiently reckless to be called punishment. In short, there is simply no evidence defen-

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[4] *continued*

a municipal employee, seeks to affix liability on the municipality. It teaches that a plaintiff generally must adduce more proof than a single incident to *infer* the existence of an unconstitutional municipal policy. Because Monell expressly rejects *respondeat superior* liability under § 1983, a "pattern" of activity by state actors must be shown to infer that a policy existed; this approach avoids pinning liability on municipalities for the random acts of municipal employees. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1522 n.20 (7th Cir. 1990). However, in cases—such as this one—where there is an acknowledged municipal policy, concerns of this sort evaporate. In this case, James is not asking us to infer the existence of a policy based on the isolated misconduct of county employees—indeed, Milwaukee County acknowledges it had a housing policy that permitted confinement of parole violators alongside probation violators. Thus, the issue here is not whether a policy existed but, whether the policy at issue inflicted wanton and unnecessary pain on inmates.

dants were on notice of an impending risk of harm to James as a consequence of housing parole violators together with probation violators. Consequently, James fails to show defendants were so reckless that their conduct suggests intent to punish.

Our recent decision in *McGill v. Duckworth*, *supra*, is instructive. The plaintiff there also maintained that a prison housing policy violated the eighth amendment by providing inadequate inmate safety. McGill, a small, young prisoner, in protective custody for snitching on other prisoners, was raped in the prison showers by inmates on disciplinary status. Attacking the prisoner classification policy, he argued prison officials should have known of the inherent risk in housing small, young, protective custody inmates in a segregation unit with inmates on disciplinary status. Noting the plaintiff's failure to provide any evidence suggesting a causal relationship between this housing arrangement and increased violence—or, for that matter, any evidence of a substantial risk of harm—we concluded McGill failed to show prison officials acted with the requisite mental state. *McGill*, 944 F.2d at 350; *see also Duckworth*, 780 F.2d at 653-54 (absent evidence of any other prison bus fires, prison officials' failure to take precautions against this risk was neither deliberate nor reckless).

Likewise, in *Marsh v. Arn*, 937 F.2d 1056, 1062 (6th Cir. 1991), a suit with considerable similarity to the case at bar, the plaintiff claimed prison policy permitted violent inmates to be housed in open dormitories alongside nonviolent inmates. Because the plaintiff failed to offer evidence of a pervasive risk of harm or to show a nexus between inmate classification and violence, the court held that the plaintiff failed to show defendant's housing policy amounted to deliberate indifference to inmate safety. *See also Rhodes*, 452 U.S. at 347 (absent evidence "double celling" increased prison violence, not the type of deprivation which evinces a desire to inflict wanton and unnecessary pain); *United States v. Michigan*, 940 F.2d 143, 158

(6th Cir. 1991) (without affirmative evidence prisoner classification system contributed to inmate violence, no finding of deliberate indifference); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 831-32 (D.C. Cir. 1988) (district court failed to find a causal link between inmate classification procedures and the level of prison violence); *Blankenship v. Meachum*, 840 F.2d 741, 743 (10th Cir. 1988) (prison officials did not act with deliberate indifference in moving plaintiff from protective custody into the general prison population); *Cody v. Hillard*, 830 F.2d 912, 914 (8th Cir. 1987) (lacking evidence "double celling" increased violence among inmates, plaintiff failed to show "wanton and unnecessary infliction of pain"), *cert. denied*, 485 U.S. 906 (1988); *Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (absent proof of a risk of harm, no deliberate indifference housing known violent inmates in the general population); *Hoptowit v. Ray*, 682 F.2d 1237, 1256 (9th Cir. 1982) (incorrect classification does not itself inflict pain within the meaning of the eighth amendment); *Gibson v. Lynch*, 652 F.2d 348, 351-52 (3d Cir. 1981) (plaintiff offered no evidence inmate classification system created an unconstitutional condition of confinement); *Gilland v. Owens*, 718 F. Supp. 665, 686 (W.D. Tenn. 1989) (absence of a classification system cannot form the basis for an eighth amendment violation); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (inmates have no constitutional claim to any particular security classification unless tied to a protected constitutional right).

Walsh v. Mellas, *supra*, provides a useful contrast. The plaintiff in *Walsh* brought a § 1983 action after being assaulted several times by his cellmate, a known gang member. As in the present case, the plaintiff in *Walsh* asserted that prison officials failed to set up adequate screening procedures for housing inmates. However, the plaintiff there showed that the defendants acted with knowledge that there was a serious gang problem in the prison, that the plaintiff was a target of the gang, and that his cellmate was a gang member. Despite this knowledge, the defendants failed to institute procedures to avoid such

pairings in housing assignments. *Walsh*, 837 F.2d at 795-96. A policy that placed a gang member and a gang target in the same cell, we concluded, constituted deliberate indifference to physical safety. By contrast, James offers no such evidence of deliberate indifference.

James encourages us to establish as a constitutional baseline the comprehensive classification system recommended by his prison expert. But the Supreme Court has explicitly declined to embrace such standards as constitutional norms. "[W]hile the recommendations of [experts] may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish [recommended goals]." *Bell*, 441 U.S. at 543-44 n.27; *see also Rhodes*, 452 U.S. at 348 n.13 (expert opinion on matters of prison administration do not establish eighth amendment standard); *Tillery v. Owens*, 907 F.2d 418, 426 (3d Cir. 1990) (expert opinions and professional standards, while instructive, are not determinative), *cert. denied*, 112 S. Ct. 343 (1991); *Cody*, 830 F.2d at 914 (recommendations of prison experts do not establish constitutional norms); *cf. Inmates of Occoquan*, 844 F.2d at 832 ("[T]he obvious danger of employing professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform."). Moreover, in evaluating prison administrative practices, the Supreme Court has admonished judges to refrain from injecting their own subjective views into eighth amendment judgments. *See Rhodes*, 452 U.S. at 346. "[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Id.* at 349 n.14; *see also Whitley*, 475 U.S. at 321-22 (admonishing courts to accord wide-ranging deference to officials in maintaining prison security); *Bell*, 441 U.S. at 562 ("The inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the constitution."). At most, James offers a theory that housing parole and probation violators together increases violence; while not without logic, absent

substantive evidence that this practice breeds violence, it is not one for which the constitution provides a blanket proscription. *See Rhodes*, 452 U.S. at 348-49.

At any rate, even the comprehensive classification system proposed by James' expert witness is problematic. His expert acknowledged that an inmate's status as a probation or parole violator is less important than whether an inmate has been convicted of a violent or non-violent crime. (One can, after all, be a parole violator whose underlying crime is non-violent, *e.g.*, larceny.) As the district court noted, a *per se* rule against housing together parole and probation violators is untenable for another reason. Both types of persons have recently been judged fit for re-entry into the community. Such a decision presumably negates any inference of violent disposition or propensity; parole is unlikely, after all, for those with a history of violent behavior in prison. Furthermore, both types of violators are often returned (or sent) to prison for similar reasons: minor infractions of parole or probation (such as failure to report to a probation or parole officer) which give no indication of violent tendencies. While it is true Hannah and James were initially classified in the same housing category, prison officials did have a system for removing excessively violent inmates from the general prison population. Such prisoners were classified as "code 10's" and placed in a maximum security segregation unit. Lotter Deposition at 34-35; Pilot Deposition at 32-36. After this incident, not surprisingly, Hannah found himself so classified. But prior to this incident, the record fails to show Hannah had a history of violent behavior in prison. Indeed, after serving part of his sentence, Hannah had been released into the community on parole. Further militating against a finding of recklessness, prison officials at the HOC administered a Felony Review Committee to monitor the behavior of felons with sentences exceeding one year (a category that did not include Hannah) and to recommend transfer of troublesome inmates to state prisons. Pilot Deposition at 30-31.

Because we find no evidence that Milwaukee County had knowledge of an impending risk of harm, we cannot say that it instituted this classification policy to inflict wanton and unnecessary pain on inmates. Accordingly, on the facts of this case, we find no constitutional violation in housing parole violators together with probation violators. Like the trial judge, we sympathize with James' tragic plight. But as a constitutional matter, he is not entitled to a particular prison classification system—he is entitled, rather, to be free from policies that inflict wanton and unnecessary pain on inmates. Absent proof Milwaukee's inmate classification policy crossed that line, James' injury was not a constitutional deprivation at the hands of state actors.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

FRANK JAMES,
CASE NO.

Plaintiff,

88-C-1128

v.

MILWAUKEE COUNTY and

FRANKLIN LOTTER,

Defendants.

HONORABLE TERRANCE T. EVANS

PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN

DECEMBER 6, 1990

COURT'S DECISION

HELD IN THE ABOVE-ENTITLED JURY TRIAL

THE COURT: In the United States House of Representatives, when any member of that body stands to give a speech or make a statement, that member ordinarily begins with a statement asking the speaker, the presiding officer, for permission to revise and extend his remarks. The reason for that is one ordinarily wants an opportunity to fully express one's self on an important issue. And that usually is better done in writing. I would prefer to have a couple of days to sit down and write a decision in this case at this point. That would give me the opportunity to edit, to modify, to soften or harden language. That's not available to a Judge in ruling on a motion at this point in a trial. We do

so from the bench. But like a member of the House I in this case reserve the right to revise and extend these remarks and put them into written form in a few days if I think that is necessary.

I must say, also, very sincerely that there are many times over the 17 years I've been a Judge that I have disliked doing things I felt I had to do. And this is one of the times. It gives me no great pleasure or satisfaction at all in making the decision that I feel has to be made here.

This is a very, very tragic case. In May of this year I ruled on a motion brought by the defendants to dismiss this case without a trial on summary judgment. I denied that motion.

On page one of that decision I noted, "In a tragic few seconds on April 10th, 1988 in the House of Correction William Hannah grabbed Frank James by the head and broke his neck rendering Mr. James quadriplegic." I stated on page two in the second paragraph, "Despite the tragic situation Mr. James has very large legal obstacles to overcome in order to prevail in his case."

When I rendered my decision denying the defendants' motion for summary judgment I believe I construed everything in the case in the light most favorable to Mr. James, giving every inference that might lie in the complaint a reading that would be in his favor. Sometimes that encourages settlement of a case. Even this case

perhaps had a chance to settle sometime before the trial. But now we're beyond that stage and it's necessary to review the law and decide whether the plaintiff has proved his case.

Now, I'm going to go back for a moment to review the original complaint filed in this case. Keep in mind that this complaint and the allegations in the first amended complaint which picks up almost all the allegations of the first complaint were the two documents -- the basis for this case -- that were before me when I ruled on summary judgment.

In other words, I essentially looked at the allegations in these documents and decided after having reviewed them, that "Mr. James has very

large legal obstacles to overcome in order to prevail this case." Now, this was what was said, this is what was presented as the basis for this case, referring first to the original complaint. The original complaint tells me that at all relevant times the defendants and each of them had knowledge that resident William Hannah was involved in gang recruitment and gang activity within the Milwaukee County House of Correction. Next, that at all relevant times herein the defendants and each of them had knowledge that William Hannah had engaged in numerous and repeated acts of violence against residents of the Milwaukee County House of Correction.

Next, that at all relevant times the defendants had knowledge that resident William Hannah had threatened guards and nurses employed at the Milwaukee House of Correction and that he had threatened them with violence. Next, that at all times relevant the defendants and each of them had knowledge that resident William Hannah and other resident gang members had attempted to recruit plaintiff Frank James into a gang. Next, that at all relevant times the defendants and each of them had knowledge that gang activity within the Milwaukee County House of Correction had led to acts of violence among residents on numerous and repeated occasions prior to the occurrences set forth in this case.

Next, that on numerous and repeated occasions prior to the occurrence set forth in this case, resident William Hannah had verbally threatened plaintiff Frank James with violence in the presence of guards employed by defendant Milwaukee County at the Milwaukee County House of Correction. It further alleges that at the time and place the defendants and each of them had knowledge that resident William Hannah had threatened plaintiff Frank James with violence, that resident William Hannah had committed acts of violence against other residents, that resident William Hannah was much larger in size and stronger than plaintiff Frank James, that resident William Hannah had access to the dorm area in

which plaintiff Frank James resided and that plaintiff Frank James had resisted joining the gang of which resident William Hannah was a member.

Skipping to another allegation, paragraph 20, it says that at the aforementioned said time and place the defendants and each of them were guilty of one or more of the following callous, reckless and deliberately indifferent acts or omissions by (A) Allowing gangs to exist at a state correctional facility; (B) Failing to curtail gang activity at a state correctional facility; (C) Failing to curtail gang recruitment at a state correctional facility; (D) Failing to curtail violence against residents of a state correctional facility.

The first amended complaint which was filed on June 20th, 1989 picks up most of the allegations regarding gang activity and gang recruitment, word for word. Allegations are repeated about William Hannah having engaged in numerous and repeated acts of violence with the knowledge of the House of Correction officers who had done nothing to stop it, the threatening of guards and nurses, the attempts to recruit Mr. James into a gang. Paragraph 16 of the amended complaint adds a further more specific allegation. It says, "At the aforesaid time and place defendant William Hannah verbally threatened Frank James in the presence of two guards employed by defendant Milwaukee County

at the Milwaukee County House of Correction."

Now, given those allegations I denied the motion for summary judgment. A new complaint was filed in this case on November 27th, one week prior to the start of this trial. In that complaint new allegations are made which bear no reasonable relationship to the severity of the allegations alleged in the original complaint. There is no person who could possibly read the first set of allegations and the new set of allegations and conclude that we're talking about the same case. In the new complaint the allegation is that the defendants somehow or other violated the constitution of the United States by the manner in which inmates at the House of

Correction were classified and placed in dormitories.

I don't know what happened to all of the allegations, serious allegations, alleged in the original complaints. I don't know what the basis was for making these allegations because the testimony from Mr. James who was a very honest witness -- and appears to be a very intelligent young man -- are that this was an unproved attack, at best an attack by Mr. Hannah over a debt owed from playing dominoes together the day before. I didn't hear from Mr. James that he had ever complained to anyone about Mr. Hannah, or that he had ever been threatened by Hannah or anything of that nature.

I am absolutely positive that if there wouldn't have been a tragic injury in this case, if this whole episode which took only about a minute would have only resulted in Mr. James getting beat up, we would not have had a lawsuit here. At least there wouldn't have been a lawsuit against the county. There could always be a lawsuit against Mr. Hannah. The unfortunate thing, of course, is Mr. Hannah doesn't have anything. It's like being hit by an uninsured motorist.

I now want to turn to the law. Because Mr. James, at the time of this incident, was a sentenced inmate, not a pretrial detainee, this case is subject to standards set out in the Eighth Amendment. Under the Eighth Amendment,

conditions at a prison must not deprive inmates of basic human needs or the minimal civilized measures of life's necessities. Such a depravation constitutes cruel and inhuman punishment. Security is the sort of basic human need of which sentenced inmates may not be deprived. This is not to say that every time security is breached, a constitutional violation is present.

As the Court of Appeals in this circuit has noted in Benson v. Cady, at 761 Fed. 2d 335, 339 (7th Cir. 1985), one of the four "best cases" the plaintiff cites in response to my request to give me his best law, this is what is said. And all of this will be in quotations. "It has long been

established, however, that negligence, evidenced by, inter alia, simple inattention or inadvertence, may not form the basis for an Eighth Amendment claim .... A plaintiff must prove deliberate indifference, evidenced by either actual intent or reckless disregard .... Although the term 'actual intent' is self-explanatory, reckless disregard is not. A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position. Recklessness is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation where a high degree of danger is present .... Although subjective

unawareness of the risk is on defense, the risk must be foreseeable. Indeed, risk is defined as a recognizable danger of injury .... The risk also must be substantial."

All those are quotations from the Benson case. Not only is this an exacting standard for a plaintiff in any case to meet, this case is complicated because the defendants are not the persons who actually physically were present at the scene. Mr. Frank Lotter is the superintendent of the institution. Milwaukee County runs the House of Correction. These defendants can be held liable under only certain circumstances as stated by the Supreme Court in Oklahoma City v. Tuttle, 471 US 808 (1985), another of plaintiff's best

cases: "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional depravation."

The plaintiff claims in this case that the policy of placing probation and parole violators in the same dormitory violates what he describes as an Eighth Amendment right to be housed in a "reasonably safe prison environment," a phrase taken from the third of the best cases cited by the plaintiff, Wrying v. Burlington County, N.J., 889 Fed 2d 1286 (3rd Cir. 1989). And I reject a "reasonably safe prison environment" as a proper standard for liability under the Eighth Amendment. Wrying involves a county jail housing pretrial detainees. Plaintiff Wrying was being held in the jail on traffic violations. The Wrying case was a 14th Amendment case. As a standard, the reasonably safe prison environment falls

short, far short, of the standard in every Eighth Amendment case, as I stated them before and will allude to them in a few moments.

The problem of the standard aside, the plaintiff also alleges that the way the House of Correction violates this standard is in its classification of probationers and parolees together. However, even the testimony of plaintiff's expert, Mr. Buckley, was equivocal on the issue. He acknowledged that these characteristics are less important than whether an inmate has been convicted of a violent or nonviolent crime. It cannot be disputed that one can be a parole violator whose underlying crime is nonviolent, larceny, for example.

In addition, requiring in all instances probation violators and parole violators to be separately housed is not rational for another reason. Both types of persons have very recently been found fit to be on the streets. Apparently they were not, at the time before their entry into the House of Correction, deemed to be highly violent people. On the basis of some violation of the conditions of probation or parole -- violations which could be minor such as a failure to report to a probation officer -- they have been placed in the House of Correction. In short, I cannot find and do not find the policy of the House of Correction as implemented by Mr. Lotter in and of itself to be unconstitutional.

This takes me to other possibilities under which the plaintiff could conceivably recover. If there were evidences that Mr. Lotter or officials at the House had repeatedly learned of threats by Mr. Hannah in this case, if Mr. Hannah and Mr. James had fought before and there was any indication from Mr. James that he desired protection and that was not afforded to him, then an issue would be presented as to whether or not there was a deliberate indifference to the reasonable safety needs of Mr. James.

As the Court in Santiago v. Lane, at 697 F. Supp. 300, 303 (N.D. Ill., 1988) noted, "Accordingly, we have held, in the context of an alleged failure by correctional officials to

protect a person from the risk of attack, that the plaintiff must prove that the officials knew or had reason to know that there was a 'strong likelihood' that violence would occur so frequently as to be 'persuasive,' a substantial risk of violence is apparent. Conversely, random acts of violence provide no basis for a finding of a substantial, foreseeable risk of harm."

Previously I asked plaintiff's counsel to provide me with the best case to support his position. I have discussed all those cases except Monmouth County v. Lanzaro, 695 F. Supp. (D.N.J. 1988), which is a case also relied upon by the defense; in fact, relied upon more justifiably by the

defense. Monmouth County does in part involve a Court's requirement that a system of classifying inmates be established. The requirement was that at least the following categories be established. This is from page 775. These are the categories. One, unconvicted females; Two, convicted females; Three, unconvicted males; Four, convicted males; Five, other classes of detainees, that is, witnesses or civil prisoners; Six, community custody inmates, that is alcoholic, narcotic addicts, mentally disturbed persons, physically handicapped persons and persons with communicable diseases; Seven, inmates requiring disciplinary detention; and Eight, inmates requiring administrative segregation. Nothing in

Monmouth requires that probation and parole violators be separated. They are, after all, at the House of Correction as relevant here all convicted males. They are all convicted males. That is one of the classifications under Monmouth that would have been acceptable.

In short, the four best cases of the plaintiff do not even come close to establishing liability on Franklin Lotter or Milwaukee County. Concededly, Mr. James has received terrible injuries, terrible injuries. However, the cold hard fact is that does not mean that Mr. Lotter or the County are liable. If I were to allow this case to continue and eventually go to a jury, and in the very unlikely chance that the

jury would find in favor of Mr. James, I would have to direct that judgment be entered notwithstanding the verdict and dismiss this case. If I did not do so, I have absolutely no hesitancy in saying that the Court of Appeals for this Circuit would do that job for me.

So its a tragedy. I feel about my job right now as some military person must feel, if we go to war in the Persian Gulf, and he must come to the door and tell a parent that you've lost a son or daughter in battle. It's a tragedy. It's a shame. There is one person in this world responsible for that, for the situation, and that's Mr. Hannah. He caused this terrible situation to be visited upon Mr. James. He should be responsible and liable.

His financial situation, his character, his position are such that Mr. James cannot look to him for monetary satisfaction. Perhaps in another life Mr. Hannah will be punished for what he did; perhaps he should be prosecuted criminally for what he did and punished for what he did. But the defendants in this case under the law as it exists are not liable.

And accordingly the motion is granted and a dismissal order is entered. That's all.

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

FRANK JAMES,

Plaintiff,

v.

MILWAUKEE COUNTY and
FRANKLIN LOTTER,

Defendants.

ORDER

In this action, Frank James alleged that his constitutional rights were violated by the manner in which inmates are classified and housed at the Milwaukee County House of Correction. A jury trial began on December 4, 1990, and proceeded through December 6, 1990. At the close of the plaintiff's case, the defendants moved for dismissal of

the action on the basis that the plaintiff had not presented evidence on any legal theory on which he could recover. I rendered an oral decision dismissing the case. That decision is attached.

The plaintiff has filed a motion, pursuant to rule 59 of the Federal Rules of Civil Procedure, to alter the judgment and for a new trial. I have reviewed the motion and find no basis on which it should be granted. The motion is DENIED.

Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

No. 91-1850

In The

Supreme Court of the United States

October Term, 1992

FRANK JAMES,

Petitioner,

versus

MILWAUKEE COUNTY and FRANKLIN LOTTER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondent respectfully submits that this case does not warrant the Court's extraordinary and discretionary consideration. The law in the area of Eighth Amendment protections accorded to inmates of prisons is well settled and there are no conflicts among the various circuits. The decisions of the Courts below follow well settled law and are clearly correct. The Eighth Amendment limitations on conditions of penal confinement, imposed upon the states through the Fourteenth Amendment, do not join issues of first impression. The Supreme Court turned its attention and consideration to that area over twenty years ago and, among its more current teaching summarized its unwavering convictions. *U.S. vs. State of Michigan*, 940 F.2d 143, 152 (6th Cir., 1991).

COUNTER-STATEMENT

In this civil rights action, the Plaintiff seeks compensation for injuries he suffered from a fight with another inmate while incarcerated at the Milwaukee County House of Correction. The injuries suffered by the Plaintiff rendered him a quadriplegic. But for the tragic and permanent extent of the injuries which resulted to this Plaintiff this litigation probably never would have been commenced. The insurmountable hurdle for this Plaintiff is the fact that the deep-pocket in this case is not a person or entity which actually caused the injury. This is an extremely difficult burden which has not been met by the facts of this case.

There are basically two theories upon which the Plaintiff could have prevailed. The first theory of liability under the Eighth Amendment would encompass those situations where a prison employees have actual knowledge of a threat to the physical safety of the Plaintiff. The second theory would encompass a situation where an inherently dangerous situation is allowed to exist. It seems to be the second theory upon which the Plaintiff has attempted to prevail in this litigation.

THE CASES CITED BY THE PLAINTIFF DO NOT SUPPORT HIS THEORY

The Plaintiff has proposed to the trial judge and the 7th Circuit Court of Appeals that a classification system for the housing of inmates is a right which is protected by the Eighth Amendment. Yet none of the cases cited by the Plaintiff remotely support this proposition.

In those cases where the Court found that prisoners were subjected to egregious and flagrant conditions, a prison classification system was found simply to have contributed to the inhuman, degrading and violent atmosphere of the prison. As the Court in *Gates vs. Collier*, 501 F.2d 1291 (5th Cir., 1974) stated at p. 1309, the total effect of overcrowding, lack of classification according to offense, untrained inmates with weapons, lack of supervision and the absence of a procedure for confiscation of weapons created a pervasive risk of harm to inmates. But the Court further states that none of these conditions taken alone would invoke constitutional protections.

As precisely stated by the 7th Circuit in the decision of this case, p. 8 n. 4:

> Thus, the issue here is not whether a policy existed but, whether the policy at issue inflicted wanton and unnecessary pain on inmates.

The policy of placing probation and parole violators in the same dorm facility is acknowledged. The issue is the nexus between this policy and the injuries to the Plaintiff. It must be proven that the policy creates a pervasive risk of harm to probation violators or non-violent prisoners. *Marsh vs. Arn*, 937 F.2d 1056 (6th Cir., 1991). One avenue open to a Plaintiff for proving such a claim would be evidence of numerous assaults on inmates with non-violent convictions by inmates with violent convictions, if such evidence existed. This is simply a method of proof, not a requirement. Yet the Plaintiff would have this Court make such a finding with no proof at all. At p. 13 in this petition the Plaintiff states:

> The fact that mixing violent and non-violent inmates in an open dormitory under the supervision of one guard creates a risk of harm is so obvious that it need not be stated.

Well, not only does it need to be stated, it needs to be proven.

CONCLUSION

The protections given a prisoner under the Eighth Amendment have been clearly enunciated by this Court and the various circuits are not in conflict. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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